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No. 79-1618

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, A Delaware Corporation,
Petitioner,

vs.

RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM MCGRATH, JON MCCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS

THOMAS J. MILLER
Attorney General of Iowa

MARK E. SCHANTZ
Solicitor General
Hoover State Office Building
Des Moines, Iowa 50312
(515) 281-5191

ROBERT W. GOODWIN
Special Assistant Attorney General

LESTER A. PAFF
Assistant Attorney General
Attorneys for Appellants

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether, with respect to eligibility for attorney's fees under 42 U.S.C. §1988, a Dormant Commerce Clause challenge to a state statute is a suit to remedy a deprivation of "any rights, privileges or immunities secured by the Constitution" within the meaning of 42 U.S.C. §1983.

2. Whether a corporation may resort to 42 U.S.C. §1983 if it claims only that it has been deprived of a privilege or immunity of citizenship.

3. Whether, consistently with the Eleventh Amendment, attorney's fees may be awarded against a state in Dormant Commerce Clause cases absent any expression of intent by Congress to abrogate immunity.

4. Whether a ruling on the purely legal question of statutory authorization or eligibility for an award of attorney's fees is void if unaccompanied by a statement of reasons.

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BRIEF OF RESPONDENTS

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, §8 United States Constitution:

> The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes . . . .

Article 1, §10 United States Constitution:

> No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .

Article 4, §2, United States Constitution:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

In July 1978, Consolidated Freightways Corporation (hereinafter "CF") filed suit in the Southern District of Iowa seeking to enjoin enforcement by Defendant officials (hereinafter "Iowa") of §321.457(6), Iowa Code (1979), a statute which limited to 60 feet the length of twin-trailered vehicles which could operate on Iowa highways.

CF's Amended Complaint alleged jurisdiction under 28 U.S.C. §§1331, 1332, 1343, 2201 and 2202 and 42 U.S.C. §1983.

(A. 6). The Complaint pleaded causes of action for 1) placing undue burdens upon, and discriminating against, interstate commerce in violation of Art. 1, §8 of the United States Constitution 2) violation of the Fourteenth Amendment and 3) violation of 42 U.S.C. §1983, (A. 11-12). In addition to injunctive relief, CF prayed for reasonable attorney's fees. (A. 13).

Iowa's Answer denied CF's jurisdictional allegations (A. 14), denied that §321.457(6) violated the Commerce Clause, the Fourteenth Amendment or 42 U.S.C. §1983 (A. 16) and prayed the court to deny CF all relief requested. (A. 16).

Shortly before trial, the United States Magistrate entered an Order granting CF's Motion to Bifurcate the claim for attorney's fees from other issues in the case. (A. 18). After an extensive trial, the District Court declared Iowa's length limitation unconstitutional in part and enjoined its enforcement on interstate highways. The District Court found that the Iowa length limitation did not discriminate against interstate commerce but that its application to interstate highways did constitute an undue burden upon commerce. *Consolidated Freightways* v. *Kassel,* 475 F.Supp. 544, 551, 553 (S.D. Iowa 1979). No claim under the Fourteenth Amendment or §1983 was discussed. Nor did the court make any explicit jurisdictional findings. Iowa appealed to the Eighth Circuit and sought a stay of the injunction. The Eighth Circuit denied the stay and ultimately affirmed the ruling below. *Consolidated Freightways* v. *Kassel,* 612 F.2d 1064 (8th Cir. 1979).

At no time between the district court's ruling and the conclusion of the appeal did CF pursue its claim to attorney's fees in the district court. Shortly after the opinion by the Eighth Circuit, however, CF filed a brief document entitled "Bill of Costs" (A. 20-21) requesting "costs under 42 U.S.C. §1988," including "Attorney's fees" for the appeal in the amount of $41,911. CF did not accompany this Bill with a brief or memorandum attempting to support its eligibility for attorney's

fees or request oral hearing before the court. By letter to the clerk, CF suggested judicial economy would be served by remand to the district court (A. 19), but no motion seeking such relief was filed with the court.

Iowa filed a Resistance objecting "to any allowance of attorney's fees . . . under 42 U.S.C. §1988." (A. 22-23). On January 16, 1980, the Eighth Circuit entered an Order denying "the motion of appellee to tax disbursements and attorney's fees. . . ." (A. 24).

On January 25, 1980, CF filed a Motion to Vacate Order requesting that the denial of fees by the January 16, 1980, Order be vacated and CF's claim to fees be remanded to the district court. CF did not request an enlargement upon or elaboration of the January 16 Order. Nor did CF request a "Statement of Reasons" for the denial of fees. CF now alleged that "§1983 and §1988 are applicable" and filed a "Brief in Support of Motion to Vacate Order," which primarily relied upon *Corfield* v. *Coryell,* 6 Fed. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823), for the proposition that the Privilege and Immunities Clause protects travel through a state for purposes of trade. No authority suggesting that §1983 reached all federal questions arising under the Commerce Clause or other provisions of Article I was provided the Court of Appeals.

Iowa again resisted, noting 1) that CF had selected this forum for determination of attorney's fees on appeal, 2) that §1983 and §1988 are not applicable, and 3) that the question of "special circumstances need not be addressed." (A. 27-28). On February 13, 1980, the Eighth Circuit denied CF's Motion to Vacate. (A. 29). The Petition for Certiorari was filed on April 15, 1980, and was granted on April 6, 1981.

SUMMARY OF ARGUMENT

I. A prevailing party in American litigation is not entitled to attorney's fees absent bad faith by the opposing party or a statute authorizing fee shifting. 42 U.S.C. §1988 authorizes fee shifting, as pertinent here, in cases for which 42 U.S.C. §1983 provides a cause of action. Section 1983 does not provide a cause of action whenever a constitutional issue is raised in a suit against a state official, but only when a "right, privilege or immunity secured by the Constitution" has been denied by conduct under color of law. The Commerce Clause of Article I, §8 does not secure "individual rights" in the constitutional sense, but rather allocates authority to the national government and, by negative implication, limits the police power of state governments. The 42d Congress did not intend to include Dormant Commerce Clause cases within §1 of the Civil Rights Act of 1871: 1) because it was drawn from criminal statutes which cannot be meaningfully applied to "violations" of the Commerce Clause, 2) because the Eleventh Amendment bars a damage remedy in cases involving state statutes and 3) because it was not needed to authorize injunctive relief. Inclusion of Dormant Commerce Clause claims within §1983 would accomplish only fee-shifting, a result that does not advance the purposes of §1988 and could befoul the "delicate adjustments" required by our Federalism.

II. Congress did not intend to extend 42 U.S.C. §1983 beyond the scope of the Fourteenth Amendment to claimed violations of those limitations directly imposed upon the states by Article I of the Constitution. The Contract Clause, the Ex Post Facto Clause and the Bill of Attainder Clause have not been "incorporated" by the Fourteenth Amendment, which §1983 was enacted to enforce. The legislative history of §1983 strongly suggests, and the early decisions of this Court confirm, that the 42d Congress did not intend to create a new remedy for Contract

Clause claims. Because these clauses may only be violated by legislative acts (rulemaking), inclusion of them within §1983 would also accomplish only fee-shifting under §1988. This analysis of the Contract Clause suggests, a fortiori, that Dormant Commerce Clause litigation should not be brought within §1983.

III. A corporation may not resort to 42 U.S.C. §1983 if it claims only a deprivation of a "privilege or immunity" of citizenship because corporations are not citizens.

IV. An award of attorney's fees in a Dormant Commerce Clause challenge to a state statute is barred by the Eleventh Amendment because there is no significant nexus between Section 5 of the Fourteenth Amendment and the Commerce Clause and because Congress has not in any manner indicated an intent to abrogate immunity in Commerce Clause cases. In any case, this Court should adopt a construction of 42 U.S.C. §1983/§1988 that avoids a substantial constitutional question concerning the application here of those statutes.

V. A statement of reasons is not essential to review of a determination of *eligibility* for fees, the question presented here, because that is a pure question of law an appellate court has plenary power to resolve. This Court may consider any issue fairly presented by the record urged by respondent in support of the ruling below. This Court may, therefore, affirm the Eighth Circuit's holding that CF is ineligible for fees without requiring an explicit statement of reasons.

ARGUMENT

I. The Dormant Commerce Clause Is A Constitutional Provision Structuring Our Federalism Rather Than A Provision "Securing" Any "Rights, Privileges Or Immunities" Within The Meaning Of 42 U.S.C. §1983.

Iowa contends that fee shifting in Dormant Commerce Clause cases has not been authorized by Congress. In the absence of such authorization, or bad faith by Iowa (which has not been alleged), the "American Rule" prohibits the award of attorney fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975).

CF contended below that fee shifting is authorized in this case by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Section 1988 authorizes fee awards, in the discretion of the court, in actions to enforce provisions of various civil rights acts, the only one of which pleaded below is 42 U.S.C. §1983. Section 1983 provides in pertinent part:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any *rights, privileges or immunities secured by the Constitution* and laws, shall be liable to the party injured at law, suit in equity, or other proper proceeding for redress. [Emphasis added].

When a plaintiff claims a cause of action is grounded in §1983 a court must ask 1) whether the conduct complained of was taken under "color of state law" and 2) whether the conduct deprives a person of "rights, privileges or immunities secured by the Constitution and laws." *Parratt* v. *Taylor,* ____ U.S. ____, filed May 18, 1981, 49 U.S.L.W. 4509, 4511. Here, defendant state officials were limiting the length of vehicles which could travel Iowa highways by virtue of express legislative command

and thus were acting "under color of law" within the meaning of §1983. However, the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and national government. The language of §1983, prior interpretations of the statute, the basic constitutional distinction between provisions protecting individual rights and provisions structuring federalism, the legislative history of §1983 and every consideration of policy point to the conclusion that the Dormant Commerce Clause is not a source of "rights, privileges or immunities secured by the Constitution."

A. Not Every State Law Which Violates The Constitution Deprives Individuals Of "Rights, Privileges Or Immunities."

The language employed by Congress in §1983, although broad, is not coextensive with the Constitution or the United States Code.[1] The "rights, privileges and immunities" language of §1983 is significantly less expansive than the language employed in the Judicial Article and in other jurisdictional statutes to authorize judicial consideration of every conflict between a state statute and federal law. For example, Article III, §2 provides: "The judicial power shall extend to all cases, in Law and Equity, *arising under this Constitution,* the laws of the United States . . . ." [Emphasis added]. And, only four years after adopting the Civil Rights Act of 1871, Congress conferred general federal question jurisdiction upon lower federal courts. 18 Stat. 470. What is now 28 U.S.C. §1331, in contrast to §1343(3), employs the terminology of Article III, §2. Similarly, §25 of the Judiciary Act of 1789 extended this Court's review by writ of er-

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[1] The language of 28 U.S.C. §1343(3), the jurisdictional counterpart of §1983, is narrower with respect to statutory rights, *Maine* v. *Thiboutot,* 448 U.S. 1 (1980), but the phrase "rights, privileges or immunities secured by the *Constitution*" is identical in both statutes and is to be given the same construction. *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 544 (1972).

ror to cases "where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repunant to the constitution, treaties or laws of the United States." 1 Stat. 73. This language, too, incorporates every conflict between state and federal law. See, *e.g.*, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921) (Commerce Clause challenge to state statute imposed as a defense to breach of contract).

This Court, moreover, has held that not every case "arising under" the Constitution falls within §1983. In *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 615 (1979), in upholding the argument that the Supremacy Clause of Art. VI, §2 does not alone "secure," and is not itself, a "right, privilege or immunity secured by the Constitution," this Court stated:

> Thus, while we recognize that there is force to claimants' argument that the remedial purpose of the civil rights legislation supports an expansive interpretation of the phrase "secured by the Constitution," it would make little sense for Congress to have drafted the statute as it did if it had intended to confer jurisdiction over every conceivable federal claim against a state agent. In order to give meaning to the entire statute as written by Congress, we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim "secured by the Constitution" within the meaning of §1343(3).

Just last term in *Pennhurst State School* v. *Halderman*, ____, U.S. ____, filed April 20, 1981; 49 U.S.L.W. 4363, 4370, this Court pretermitted the question whether §6011 and 6063 of the Developmentally Disabled Assistance and Bill of Rights Act may be enforced via 42 U.S.C. §1983, as interpreted in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), stating:

> Whether *Thiboutot* controls this case depends on two factors. First, respondents here, unlike the plaintiff in *Thiboutot* who alleged that state law prevented him from receiving federal funds to which he was entitled, can only claim that the state plan has not provided adequate "assurances" to the Secretary. *It is at least an open question whether an individual's interest in having a State provide those "assurances" is a "right secured" by the laws of the United States within the meaning of* §1983. [Emphasis added].

See also *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, ____ U.S. ____, filed June 25, 1981, 49 U.S.L.W. 4783, 4788.

Several lower federal courts have made the same point since *Thiboutot*. In *First National Bank of Omaha* v. *The Marquette National Bank of Minneapolis*, 636 F.2d 195, 198 (8th Cir. 1980, *cert. denied* ____ U.S. ____, April 7, 1981; 49 U.S.L.W. 3743, the court rejected a claim that the National Bank Act conferred a "right" to collect interest at the "most favored lender" rate, as the term "right" is employed in 42 U.S.C. §1983.

In *Meyerson* v. *Arizona*, 507 F.Supp. 859, 864 (D. Ariz. 1981), the district court rejected a claim that §1983 provides a cause of action for violation of §503 of the Rehabilitation Act of 1973, 29 U.S.C. §193 (Supp. II 1978), stating Iowa's position in succinct terms:

> Thus, before one can enjoy a right of action under §1983, one must establish a violation of a federally protected right independent of §1983. In order to have an action under §1983, it is not enough to establish the violation of a federal statute. Rather, the statute violated must be one that confers a federal right upon the plaintiff.

B. Constitutional Provisions Structuring Our Federalism Do Not Secure "Rights, Privileges Or Immunities."

The Commerce Clause, Art. I, §8, grants to Congress the power to regulate interstate commerce. Unlike the Supremacy Clause involved in *Chapman,* the Commerce Clause is a substantive grant of power to the national government. That grant of power, in part because of the Supremacy Clause, has been held negatively to imply a limitation upon the states. Thus, these two critical clauses order the distribution of power between state and nation in our federal system. Neither clause expressly and generally limits the power of government over individuals. Iowa contends that only those provisions limiting governmental power over individuals should be considered "rights, privileges or immunities" within the meaning of §1983.

In his recent book, *Judicial Review in the National Political Process* at 174-75 (1980), Prof. Jesse Choper bases an entire theory of judicial review on the distinction Iowa urges, which he articulates as follows:

> When a litigant contends that the national government (usually the Congress, but occasionally the executive, either alone or in concert with the Senate) has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type—which falls into the individual rights category of constitutional issues, explored in chapter 2—is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one. To put it

> another way, a federalism attack on conduct of the national government contends that only the states may so act; a federalism challenge to a state practice asserts that only the central government possesses the exerted power; neither claim denies government power altogether.

Because Congress could enforce a 55-foot length limit for vehicles travelling interstate highways, CF does not have a constitutional "right" to operate 65-foot trucks, as the term "right" is traditionally employed in constitutional discourse.

Few distinctions in American constitutional law are more thoroughly accepted than that between provisions allocating power among branches of levels of government, on the one hand, and provisions protecting the individual from government on the other. The Commerce Clause in general, and Dormant Commerce Clause litigation in particular, are invariably classified by the textwriters and casebook authors as presenting a problem in federalism rather than a problem of individual rights.[2]

Commentators writing specifically on the Commerce Clause have employed a similar analytical framework. Justice (then Professor) Frankfurter makes the point in these terms:

> Two major issues have been the dominant concern of the Supreme Court throughout its history. Under shifting forms and with varying intensity, the Court has had to decide what belongs to the nation and what belongs to the states, under what circumstances may society intervene and when is the individual to be unrestricted.

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[2] See, *e.g.*, J. Nowak, *et al.*, *Constitutional Law* (1978) (*compare* Part II *with* Part III); B. Schwartz, *Constitutional Law* (2d ed. 1979) (*compare* ch. 4 *with* chs. 6-9); L. Tribe, *American Constitutional Law* (1978) (*compare* ch. 6 *with* ch. 7); P. Brest, *Processes of Constitutional Decision-making* (1975) (*compare* ch. 3 *with* ch. 7); P. Freund, *et al.*, *Constitutional Law* (4th ed. 1977) (*compare* Part II with Part III); G. Gunther, *Constitutional Law* (9th ed. 1975) (*compare* Part II *with* Part III).

F. Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* at 111-12 (1964 ed.).

And Professor Gavit states flatly:

> If the Commerce Clause is a jurisdictional dividing line between Congressional and state power to regulate the conduct and legal interests of those engaged in interstate or foreign commerce, what is the theoretical and practical result as far as those individuals are concerned?
>
> * * *
>
> The Commerce Clause created no rights or privileges; it established no law other than the law of jurisdiction to regulate those engaged in interstate or foreign commerce.

B. Gavit, *The Commerce Clause* at 32-33 (1932).

In his seminal article advocating an explicit balancing of state and national interests, Professor Dowling observed: "It is true that the litigation is between private parties, but the issue touches the relative jurisdiction of nation and state. After all, this is statecraft in which the courts are engaged." Dowling, *Interstate Commerce and State Power,* 27 Va. L.Rev. 1, 22-23 (1940).

Professor Tushnet echoes the theme in more contemporary jargon:

> Judicial review must be carefully coordinated with the operation of the political branches if democratic decision-making is to be protected. Questions arising under the dormant commerce clause illustrate the utility of a political theory of judicial review in which the focus of concern is the adequacy of the political branches to protect important interests. Indeed, a political theory may be the only one upon which dormant commerce clause doctrine can rest, for the institutional problems of federal-state relations,

> and the separation-of-powers issues associated with them, do not easily lend themselves to solution by attention to individual rights, the major competitor of the political theory, as a general justification of judicial review.

Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125, 165-66.

The language employed by this Court's decisions in Dormant Commerce Clause cases reflects the distinction Iowa urges. For example, Justice Jackson justified a result by invoking, not the need to protect the individual from government, but rather the "principle that our economic unit is the nation," a "federal free trade unit." *H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 539 (1949). That principle has been extremely important to our general economic welfare; it does not address the relationship between the individual and the state.

C. The Background To §1983 Supports A Distinction Between Federalism Provisions And Provisions Protecting Individual Rights.

This fundamental distinction between those Constitutional provisions which protect individual rights and those which structure governmental power is reflected in the debates of the Civil Rights Act of 1871. Rep. Shellabarger, a leading supporter of the Act, not only articulated the distinction clearly, he indicated that the Act was not concerned with enforcing the federalism provisions:

> My next proposition is historical, and one simply in aid and support of the truth of the first. It is that the United States always has assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution. Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in the tenth section of first article, that 'no State shall make a treaty,' 'grant letters of marque,' 'coin money,' 'emit bills

> of credit,' & c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. *These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or liabilities of persons within the States, as between such persons and the States.*

Cong. Globe, 42 Cong., 1st Sess., App. 68 (1981) (hereinafter "*Globe App.*").

Representative Shellabarger proceeded to argue that the Act was needed to enforce the rights created by §1 of the Fourteenth Amendment, *Globe App.* at 70, and this Court has regularly stressed that §1983 was intended to remedy violations by states of those individual rights. See, *e.g.*, *Monroe* v. *Pape*, 365 U.S. 167, 171 (1916). The Fourteenth Amendment certainly created a new array of individual rights pro[illegible]ted against state as well as federal encroachment. But it is difficult even to articulate, much less defend, the proposition that the Fourteenth Amendment in some manner affected the meaning of the provisions of Article I allocating authority to the national government. It follows that §1983 was not intended to provide a cause of action for alleged violations of limitations on state power implied negatively from a grant of authority to the national government. Certainly there is nothing in the legislative history of §1983 which would suggest that the 42d Congress viewed either the Fourteenth Amendment or §1983 as at all concerned with the types of state police power legislation which forms the grist for the Dormant Commerce Clause mill.

The origin of §1983, on the other hand, strongly indicates that Congress would not have had Commerce Clause litigation in mind. Section 1 of the 1871 Act, now §1983, was derived from the Civil Rights Act of 1866 and its central purpose was to add a civil remedy against the denial of rights, the "willful" denial of which had previously been enforceable only by *criminal* prosecutions. See *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 610 at n. 25 (1979), citing Cong. Globe, 42d Cong., 1st Sess. 568. (1871) (remarks on Sen. Edmunds); id., App. 68 (remarks of Rep. Shellabarger). And, in *Monroe* v. *Pape,* 365 U.S. 167, 184-85 (1961), this Court held that the phrase "under color of law" should be construed identically with the same language in 18 U.S.C. §242, given that §242 also evolved from §2 of the Act.[3]

Iowa knows of no federal criminal prosecutions under 18 U.S.C. §242 for "wilfully burdening interstate commerce." Among other reasons that may be true is Dormant Commerce Clause cases, unlike search and seizure cases, appear always to involve challenges to state or municipal legislation or rulemaking. The claim is that the *enactment* of the *law* is *ultra vires* the state. Congress would not have contemplated putting members

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[3] It has also been urged that §1983 was modelled in part on §6 of the 1870 Civil Rights Act, 16 Stat. 144, later §508 of the Revised Statutes. *Chapman, supra* at 651-54 (White J. concurring).

18 U.S.C. §242 provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any *rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,* or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life. (Emphasis added).

of a state legislature in jail for exceeding limits on its power implied from grants of power to the United States. See *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U.S. 391 (1979); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). If Commerce Clause litigation would not involve the denial of "rights, privileges or immunities secured by the Constitution" for purposes of 18 U.S.C. §242, it should not involve them for purposes of 42 U.S.C. §1983.

D. Dormant Commerce Clause Litigation Has Not Been Brought Pursuant To Section 1983.

Iowa's position is also supported by the consistent behavior of American lawyers. In over 100 years there have been almost no suggestions that §1983 provided a remedy for Dormant Commerce Clause cases or that 28 U.S.C. §1343(3) afforded federal jurisdiction for them. Rather, the practice until recently has been to seek only injunctive relief, to invoke 28 U.S.C. §1331, and to plead the required jurisdictional amount. Thus, writing in 1977, Prof. Moore would state:

> There remain some cases in which redress is sought against action taken under color of law in which the litigation must proceed under §1331 and the amount in controversy must be shown. Actions against federal officers constitute one example . . . . Another example is to be seen in actions challenging legislation as violative of the commerce clause. See, e.g., International Packers, Ltd. v. Hughes, 271 F.Supp. 430 (S.D. Iowa 1967).[4]

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[4] In *Hughes*, a three-judge court declared the Iowa Meat Labeling Act discriminatory against, and a burden upon, interstate commerce. The court specifically addressed the question whether the $10,000 amount in controversy requirement of §1331 jurisdiction had been satisfied, a problem which the attorneys would not have permitted to arise if they believed §1343(3) was even arguably applicable. See also *New York State Waterways Association, Inc.* v. *Diamond*, 469 F.2d 419, 421 (2d Cir. 1972).

1 *Moore's Federal Practice*, ¶0.62[2-2] at 666.

In *Connor* v. *Rivers*, 25 F.Supp. 937, 938 (N.D. Ga. 1938), the only such case discovered decided prior to 1970, a three-judge court dismissed for want of jurisdiction a commerce clause challenge to an act requiring the licensing of photographers, because the complaint did not allege $3,000 in controversy and because:

> Subsec. 14 of Sec. 41, Title 28 U.S.C.A. taken in connection with the history of the acts in the matter of civil rights, Title 24, R.S., and especially Sec. 1979, 8 U.S.C.A. §43, convince us that this Subsec. 14 does not give jurisdiction in this suit. *While there is an allegation about the Georgia statutes' interfering with the interstate commerce, it is clear that there is no claim or evidence that said Georgia Statute deprives the petitioner 'of any right, privilege, or immunity, secured by the Constitution of the United States,* or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons with the jurisdiction of the United States. (Emphasis added).

A LEXIS-aided search has revealed only two recent cases focussing directly upon whether 42 U.S.C. §1983 or 28 U.S.C. §1343(3) may be resorted to where the only constitutional claim alleged involves the Dormant Commerce Clause.[5] In *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F.Supp. 1297, 1305 (D. Mont. 1975) *aff'd* 425 U.S. 463 (1976),[6] the district

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[5] In addition, *Kennecott Corp.* v. *Smith*, 637 F.2d 181, 186 (3d Cir. 1980), suggests in a footnote, and as alternative ground for not applying 28 U.S.C. §2283, that a challenge to the New Jersey Corporation Takeover Bid Disclosure Act based on the Williams Act and the Commerce Clause could be brought pursuant to §1983.

[6] This Court noted that the district court found jurisdiction over the individual Indian plaintiffs on the basis of 28 U.S.C. §1343(3), but did not review the jurisdictional issue because all of the substantive issues could be reached by deciding the claims of the Tribe alone, over which the lower court clearly had jurisdiction. 425 U.S. at 475, n. 14.

court, as does Petitioner here, relied solely upon the dictum in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549, n.16 (1972), that the phrase "rights, privileges or immunities secured by the Constitution and Laws" includes not only Fourteenth Amendment rights but [all of] the Constitution [and] laws of the United States," to conclude that an alleged violation of the Commerce Clause stated a claim under §1983. Of course, *Lynch* involved a due process and equal protection challenge to a statute authorizing summary pre-judicial garnishment, which a three-judge court had dismissed for want of jurisdiciton because the suit allegedly involved "property" rights rather than "personal" rights. *Lynch* addressed only whether §1983 was limited to some *subset of rights protected by the Fourteenth Amendment*. *Lynch* did not hold that §1983 embraces rights, privileges or immunities protected by Article I, see Division II, *infra*, much less that the Commerce Clause is a source of "rights" within the meaning of 42 U.S.C. §1983.

In *Czajkowski* v. *Illinois*, 460 F.Supp. 1265 (N.D. Ill. 1977), the other recent decision, Judge Marshall held that a Commerce Clause challenge to the Illinois Cigarette Tax Act brought by Indiana retailers, Illinois distributors and others could not be grounded in 42 U.S.C. §1983 and 28 U.S.C. §1343(3). After carefully reviewing *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), and noting that it distinguished rather than overruled three early decisions denying jurisdiction over actions to enjoin state taxes, *Carter* v. *Greenhow*, 114 U.S. 317 (1885), *Pleasants* v. *Greenhow*, 114 U.S. 323 (1885), and *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68 (1900), see Division II, *infra*, the court declined jurisdiction and quoted from Judge Friendly's opinion in *Eisen* v. *Eastman*, 421 F.2d 560 (2d. Cir. 1969):

> Later, Judge Friendly adds that:
>
> > It is quite hard to believe . . . that the framers either of §1 of the Civil Rights Act of 1871 or of its suc-

> cessors would have thought the statute could be invoked by a person complaining of state taxes allegedly barred by the Commerce Clause. 421 F.2d at 566.
>
> Although these remarks are clearly *dicta,* and *Eisen* has been almost completely overruled by *Lynch,* they are especially pertinent to this case, since plaintiffs include a Commerce Clause claim in their §1983 allegations.

460 F.Supp. at 1278.

E. **Considerations Of Policy Suggest That Inclusion Of Commerce Clause Challenges Within §1983 Would Not Promote Its Objectives.**

Just because Commerce Clause cases involve "what belongs to the nation and what belongs to the states," rather than individual rights, inclusion of them within §1983 would serve no useful purpose and could well cause practical mischief.

If §1983 is not extended to cover Commerce Clause cases, individuals seeking to vindicate the national interest in a free market may resort to 28 U.S.C. §1331 and the established practice of this Court to enjoin the enforcement of unconstitutional statutes by state officials. See *Bell* v. *Hood,* 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 400 (1971) (Harlan, J. concurring). Dellinger, *Of Rights and Remedies: The Constitution As a Sword,* 85 Harv.L.Rev. 1532, 1542-43 (1972). Certainly there have been many instances where state officials have been injoined in Dormant Commerce Clause cases without the slightest indication that §1983 had been pled or was necessary to afford a remedy. See, *e.g., Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959); *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I.&.P.R.Co.,* 393 U.S. 129 (1968), *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970).

To Iowa's knowledge, no prevailing plaintiff in a Commerce Clause challenge has sought damages. much less been awarded

them. It seems unlikely that Congress would have regarded damages as appropriate in these cases and under present doctrine it appears that the damage remedy would accomplish either nothing or too much. Most Dormant Commerce Clause litigation involves challenges to *state* statutes. Because an award of damages against a state under §1983 is barred by the Eleventh Amendment, *Queen* v. *Jordan*, 440 U.S. 332, 334 (1979), and because the Commerce Clause is not susceptible of violation by government officials acting individually, damages would simply not be involved in the vast majority of cases. Put differently, Iowa contends that the Commerce Clause is a constitutional provision not "susceptible of violation by government officials acting individually." L. Tribe, *American Constitutional Law*, §18.4 (1978). Cf. *Ingraham* v. *Wright*, 430 U.S. 651 (1977).[7]

Under the recent decision in *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), the occasional successful challenge to a city or county ordinance could conceivably generate damages. However, not only will the typical corporation plaintiff be in a superior position to spread any loss associated with the burdensome regulation, but municipalities may well be unduly "chilled" by the prospect of judgments which would dwarf[8] the typical award in litigation involving violations of individual rights.

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[7] In *Ingraham*, this Court addressed whether the Florida legal structure satisfied due process rather than whether the isolated acts of an individual school principal were constitutional. Prof. Tribe suggests that the requirements of just compensation and procedural due process are the best examples of norms addressed to legal *systems*. Rights protected by the First Amendment, the Fourth Amendment and the Equal Protection Clause, on the other hand, rather clearly may be violated by individuals. The proposition that limitations imposed directly on states by individuals by Art. 1, §10 are also not susceptible to violation by individuals is discussed in Division II, *infra*.

[8] In this case, the damages allegedly claimed by the potential class of plaintiffs amounted to $12,600,000. *Kassel* v. *Consolidated Freightways*, ____ U.S. ____ (filed March 24, 1981), 49 L.W. 4328.

Bringing the Commerce Clause within §1983 would have the effect of triggering attorney's fees under 42 U.S.C. §1988 in challenges involving state statutes, but that also appears unnecessary and possibly counterproductive. The purpose of providing attorney's fees for civil rights cases is to finance "private attorneys general" who would otherwise lack the wherewithal to seek legal vindication in the courts:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate those rights in court.

Senate Report No. 94-1011 at 3, as reprinted in 1976 *U.S. Code, Cong. Rec. & Admin. News* 5908.

That concern would seem to have no application to a plaintiff whose annual revenues approach $750,000,000* or to Commerce Clause plaintiffs generally. Nowhere in the legislative history of §1988 is there any suggestion that Congress was inclined to subsidize large corporate plaintiffs and a fair inference from that history is Congress in 1976 did not view Dormant Commerce Clause cases as falling within §1983. See generally *Source Book: Legislative History, Texts, and Other Documents,* Civil Rights Attorney's Fees Awards Act of 1976 (Public Law 94-559, S. 2278) (1976).

Moreover, Dormant Commerce Clause litigation involves the "delicate adjustment" of local and national interests, *Raymond Motor Trans. Inc.* v. *Rice,* 434 U.S. 429, 440 (1978). It seems undesirable to encourage the states to withdraw to a safe margin from potential burdens on interstate commerce in regulating in

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* *Consolidated Freightways* v. *Kassel,* Plaintiff's Trial Exhibit 46, p. 24 (Testimony of Robert E. Wrightson).

the interest of public health and safety. There may be little cost associated with providing "more process than is due" or more search warrants than would be strictly necessary; there may be significant costs associated with ineffectual health or safety standards.

Finally, this Court has stressed that a thorough ventilation of legislative fact issues is vital to Commerce Clause adjudication and has implicitly criticized a state Attorney General who chose not to present an extensive factual case. *Raymond Motor Trans. Inc.* v. *Rice,* 434 U.S. 429, 437, 444, 447 n. 25 (1978). Attorneys General would be sent contradictory signals, to say the least, if they were now told that the price of a vigorous, good faith, but unsuccessful defense is not only the state's out-of-pocket expenses but also fees of plaintiff's counsel running into hundreds of thousands of dollars.[10]

No court has yet awarded attorney's fees in a Commerce Clause case under §1988 or otherwise; Iowa urges this court to maintain that sensible practice.

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[10] As one source states:

> Too many state local governments simply lack the financial capacity to pursue expensive litigation, sometimes to the highest level, where the costs are likely to run into the hundreds of thousands of dollars.

American Council on Intergovernmental Relations, *Docket Book* at 126, 70th Meeting (June 19-20, 1980).

II. Congress Did Not Intend To Extend 42 U.S.C. §1983 Beyond The Scope Of The Fourteenth Amendment To Claimed Violations Of Those Limitations Imposed Directly Upon The States By Article I Of The United States Constitution.

Iowa contends above that Dormant Commerce Clause litigation does not involve "rights, privileges or immunities secured by the Constitution" because that phrase should not be extended to provisions that allocate authority between levels or branches of government. Article I, §10 of the Constitution on the other hand, does include express limitations on the states: the Contract Clause, the Ex Post Facto Clause and the Bill of Attainder Clause. These provisions, unlike the Commerce Clause, arguably fall within the literal language of §1983. However, because Congress was acting to enforce the Fourteenth Amendment when it enacted §1983, because it would not have occurred to Congress that additional remedies were needed, and because in practice §1983 would provide no additional remedies for Article I limitations, this Court has properly concluded that the 42d Congress did not intend to include them within the new federal cause of action afforded by §1983. Although this Court need not again address this issue to resolve the precise question at bar, Iowa would suggest that the history of Contract Clause litigation in particular illuminates the present issue and suggests, *a fortiori,* that Congress did not intend to include within §1983 the indirect benefits afforded interstate business by judicial recognition of the negative implications of the Commerce Clause.

A. The Background to §1983 Strongly Suggests It Should Not Be Extended To Art. I, §10 Limitations.

As noted in Division I above, §1983 was enacted pursuant to §5 of the Fourteenth Amendment for the purpose of enforcing the Fourteenth Amendment, *Monroe* v. *Pape,* 365 U.S. 167 (1961), and the scope of §1983 is coextensive with the scope of the Fourteenth Amendment:

> In the decade following *Screws*, the potential reach of section 1983 was considerably enlarged by the gradual incorporation of the guarantees of the Bill of Rights into the due process clause and the emergence of the modern equal protection and due process doctrines. Although section 1983 does not specifically encompass these provisions, the ambit of the statute is determined by that of the fourteenth amendment which it was enacted to enforce, and as the latter came to comprehend a wider variety of interests, the foundation for a broad interpretation of the civil rights acts was laid.

Developments in the Law, *Section 1983 and Federalism*, 90 Harv.L.Rev. 1133, 1169 (1977).

To our knowledge, it has never been suggested that the Fourteenth Amendment "incorporates" the rights protected by Art. I, §10. Indeed, such a suggestion would appear totally redundant. The reason the Bill of Rights requires total or selective "incorporation" is because, in terms, they are applicable only to the Federal government. The prohibitions of bills of attainder and ex post facto laws apply directly to the states by virtue of the original text, Art. I, §10, as well as to the Federal government, Art. I, §9.

The Contract Clause is an independent prohibition on the states alone and is not "a part of the 'centerpiece' of constitutional rights guaranteed and protected by the Fourteenth Amendment." *Poirier* v. *Hodges*, 445 F.Sup. 838, 842 (M.D. Fla. 1978) (Contract Clause does not create rights redressable under 42 U.S.C. §1983).

The legislative history of §1983 is certainly consistent with the view that its scope does not exceed the Fourteenth Amendment. Representative Bingham discussed the limitations on state legislative power in the original constitution in a manner which suggests his purpose was to provide for Fourteenth Amendment rights what had always been available for Article I limitations:

> Mr. Speaker, allow me to say, further, that by the text of the Constitution as you remember it, and as all thoughtful Representatives remember it, there are negative limitations upon the power of the States; as, for example, that no State shall make an *ex post facto* law; that no State shall pass any law impairing the obligation of contracts; that no State shall grant any title of nobility; that no State shall make anything a legal tender but gold and silver coin, that no State shall enter into any treaty alliance, or confederation, nor any compact or agreement with another State, or with a foreign Power, & c.
>
> *These are of the negative limitations on the power of the States in the original text of the Constitution. Does the gentlemen undertake to tell me that they have not always been enforced against State constitutions and State statutes, and the judgment of the highest courts of the States, in the Supreme Court of the United States, under the twenty-fifth section of the act of 1789?* Why, sir, if I were to read the decisions that have been made in the exercise of this very power, under that law, enforcing these negative prohibitions upon States, the sum would go down before I had read even a syllabus of the cases. [Emphasis added].

Globe App. at 83.

Rep. Bingham latter expressed his view of the scope of the "privileges and immunities," a remedy for the deprivation of which §1 of the Act was to provide. As author of the Fourteenth Amendment, he explained his principal objective was to overrule *Barron* v. *Baltimore,* 32 U.S. (7 Pet.) 243 (1833).

> Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said 'no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;' imitating their example and imitating it to the letter, I prepared the

provision of the first section of the fourteenth amendment as it stands in the Constitution, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

I hope the gentleman now knows why I changed the form of the amendment of February, 1866.

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows:

* * *

These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.

Globe App. at 84.

Rep. Bingham went on to reemphasize that he was urging Congress to provide pursuant to §5 of the Fourteenth Amendment a remedy for the privileges or immunities, *i.e.* the Bill of Rights, guaranteed by §1 of the Fourteenth Amendment against state infringement, just as Congress had previously provided, via the Judiciary Act of 1789, a remedy for violation of limitations imposed upon the states by Art. 1, §10 of the "old" Constitution:

> The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full

> protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, *they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy.* They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?
>
> I respectfully ask my friend from Illinois [Mr. Farnsworth] to review all that he had said on this subject. *If I am not right in asserting that the negative limitations imposed by the Constitution on States can be enforced by law against individuals and States, then the Government was wrong from the administration of Washington down, and the Supreme Court of the United States was wrong every time this question has come before it.* [Emphasis added].

Globe App. at 85.

Other members of the 42d Congress clearly took a narrower view of the scope of §1 of the Fourteenth Amendment and thus of the "rights, privileges or immunities secured by the Constitution." See, *e.g.*, Remarks of Sen. Bayard, *Globe App.* at 243. Iowa knows of no suggestion, however, that Rep. Bingham's view was too narrow and that the Act under debate should be understood also to provide a new remedy for violations of limitations imposed by Art. I, §10 of the "old" Constitution.

B. Early Decisions Of This Court Declined To Extend §1983 To Contract Clause Cases.

The decisions of this Court directly and indirectly confirm the view that Contract Clause cases are not within §1983. As early as the *Civil Rights Cases*, 109 U.S. 3, 12-13 (1883), in explaining the conclusion that the Fourteenth Amendment, unlike the Thirteenth Amendment, extended only to "state action," this Court stated in passing that the Contract Clause addressed only one form of state action: *legislation* impairing the obligation of contracts:

> An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example; the Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789 [1 Stat. at L., 85], giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts

generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and under the broad provisions of the Act of March 3, 1875, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. *But under that or any other law it must appear, as well by allegation as proof at the trial, that the Constitution had been violated by the action of the State Legislature. Some obnoxious state law, passed or that might be passed, is necessary to be assumed, in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against state laws impairing the obligation of contracts.* (Emphasis added).

Shortly thereafter, in *Carter* v. *Greenhow,* 114 U.S. 317 (1885), this Court squarely held that an action alleging a state statute impairs the obligation of contract does not come within §1983. Carter was the holder of bonds issued by the State of Virginia which stated on their face that they were receivable in payment of all taxes. Carter tendered these coupons in payment of property taxes to Greenhow, the Treasurer of the City of Richmond, who refused to accept them because a Virginia statute enacted subsequent to the issuance of the bonds required taxes to be paid in gold, silver, United States treasury notes or national bank currency. The Treasurer subsequently levied against Carter's property to obtain the $200 due in taxes. Carter apparently did not challenge the new statute in resistance to the levy, but rather brought an original action for damages in the United States Circuit Court.

This Court rejected the suit on two grounds. First, the opinion states that the Constitution does not secure a right to pay

taxes in coupons, in effect holding that the vice is in the enactment of the new legislation, which must be challenged directly by seeking an injunction against its enforcement, rather than indirectly by seeking damages for breach of contract from the Treasurer:

> That constitutional provision, so far as it can be said to confer upon, or secure to, any persons, any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are nevertheless passed by the Legislature of a State, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it.

114 U.S. at 322.

Second, the opinion articulates the available remedies for challenging statutes which allegedly impair the obligation of contract:

> And the only mode in which that constitutional security takes effect is by judicial process to invalidate the unconstitutional legislation of the State, when it is set up against the enforcement of his rights under his contract. The mode in which Congress has legislated in aid of the rights secured by that clause of the Constitution, is, as is pointed out with clearness and fullness in the opinion of the court in the Civil Rights Cases, 109 U.S., 3-12 [Bk. 27, L.ed. 835-840], by providing for a review on writ of error to the judgments of the state courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the Circuit Courts by the Act of March 3, 1875,

> chap. 137, 18 Stat. at L.470 of all cases arising under the Constitution and laws of the United States, where the sum of value in dispute exceeds $500. Congress has provided no other remedy for the enforcement of this right.
>
> It might be difficult to enumerate the several descriptions of rights secured to individuals by the Constitution, the deprivation of which, by any person, would subject the latter to an action for redress under section 1979, Rev. Stats.: and, fortunately, it is not necessary to do so in this case. It is sufficient to say that the declaration now before us does not show a cause of action within its terms.

114 U.S. at 322-23.

Then, in *Hans* v. *Louisiana,* 134 U.S. 1 (1890), this Court reviewed a suit brought in the United States Circuit Court against the State of Louisiana by one of its citizens to recover the amount of coupons annexed to Louisiana bonds which had been effectively repudiated by an amendment to the state Constitution. After noting that *Ex parte Ayers,* 123 U.S. 443 (1887), had held that the Eleventh Amendment barred an identical suit by citizens of other states, this Court recognized sovereign immunity as a defense to a suit for damages against a state by one of its own citizens. The opinion reaffirmed, however, that the Eleventh Amendment was not a bar to review by this Court of state court judgments rejecting a defense based upon the Contract Clause. 134 U.S. at 19.

In *Pennoyer* v. *McConnaughy,* 140 U.S. 1 (1891), however, this Court made clear that the equity jurisdiction of the federal courts could be invoked to prevent acts by state officials which were authorized only by a statute violating the Contract Clause. The opinion attempted to draw a line for Eleventh Amendment purposes between damage actions and actions for specific performance on the one hand and injunctions against future actions by state officials on the other, a distinction quite similar to that drawn more recently in *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

In *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68 (1900), this Court reaffirmed *Carter* v. *Greenhow*. Holt brought an action in federal court to enjoin the collection of taxes on capital stock, the value of which was derived from patent rights, claiming that rights granted by federal patents could not be subject to tax because of the Supremacy Clause and that the obligation of a contract between himself and the public had been unconstitutionally impaired. Holt asserted federal jurisdiction, *inter alia*, under what is now 28 U.S.C. §1343(3), but this Court again held that such a suit must be brought under the federal question provision, which then required $2,000 in controversy. The opinion contains dicta to the effect that due process and equal protection suits do not fit within §1343(3), which has been repudiated, but the holding has not been impaired.[11]

More recently, this Court has again recognized that equity actions under §1331 may be brought to enjoin a state officer from enforcing tax laws which impair the obligation of a contract derived from a legislatively granted corporate charter, subject to the restraint of 28 U.S.C. §1341, forbidding federal injunctions against the collection of a state tax if state law provides an ade-

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[11] Dicta in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 at n. 6 (1972), attempted to confine *Carter* and *Holt* to constitutional challenges to the collection of state taxes. Appellees there had cited the cases in support of the "personal rights—property rights" distinction for civil rights jurisdiction rejected in *Lynch*, a proposition the cases supported at best obliquely. But *Carter*, as is demonstrated in the text, also had little to do with the collection of state taxes in the sense that prompted Congress to enact 28 U.S.C. §1341. *Carter* was a damage action for failure to honor public bonds in payment of taxes. Careful analysis suggests *Carter* is a fully viable precedent for the proposition that Article I rights are not within a statute designed to enforce the Fourteenth Amendment. And *Holt*, although in fact a challenge to collection of a state tax, was not decided on the ground that a *remedy* should be withheld, but rather on the ground that the federal courts lacked *jurisdiction* over Contract Clause challenges absent pleading of the jurisdictional amount required for general federal question jurisdiction.

quate remedy. *Georgia R. & Banking Co.* v. *Redwine,* 342 U.S. 299 (1952). And, in *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234 (1978), this Court held that an injunction should issue against the retrospective application of the Minnesota Private Pension Benefits Protection Act to an employer whose qualified pension agreement with its employees did not meet the statutory requirements.

C. No Useful Purpose Would Be Served By Extending § 1983 To Contract Clause Cases.

The teaching of this line of Contract Clause cases, in addition to two precise holdings that such cases do not come within 28 U.S.C. §1343(3) or 42 U.S.C. §1983, include the lesson that nothing of significance would be accomplished by including Contract Clause cases within §1983. The Contract Clause "is not applicable to mere individual conduct by persons acting under color state law." *Poirier* v. *Hodges,* 445 F.Supp. 838, 842 (M.D. Fla. 1978). See also *Ingraham* v. *Wright,* 430 U.S. 651 (1977); L. Tribe, *American Constitutional Law,* §18.4(1977); and discussion in Division I at p. ____, *supra.* Rather, the Contract Clause limits a state's legislative or rulemaking activity. Put differently, it is addressed to the legal system as a whole rather than to individual government officials. It follows that the damage action against state officials in their individual capacity generally available under §1983 would not be available in this class of cases. Similarly, this lesson also means that 18 U.S.C. §242, the criminal statute parallel in scope to §1983, would have no application to a "denial" of Contract Clause "rights." Again, it would seem to follow that if a class of cases could not be within the scope of §242, it should not be within the scope of §1983.

Third, the traditional equity power of federal courts affords appropriate injunctive relief in Contract Clause cases without the benefit of statutory authorization. Thus, resort to §1983 is not necessary to obtain the only relief that may otherwise be afforded in Contract Clause cases.

There is no reason to believe that any of this doctrine would have come as a surprise to the 42d Congress and thus it is even clearer that they would not have intended to include Art. I, §10 limitations within §1983. Indeed, nothing about the history of Art. I, §10 litigation, before or after the Civil War, suggests that Congress would have perceived, with respect to these rights, a need to provide a "remedy where state law was inadequate" or "a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe* v. *Pape*, 365 U.S. 167, 173-74 (1961).[12]

Perhaps the only argument that would support a reading of §1983 broad enough to include rights guaranteed by Art. I, §10 would be the suggestion that *Maine* v. *Thibotout, supra* can be extended to cover this case. *Thibotout* held that the phrase "and laws" includes all laws intended by Congress to create rights and, unlike 28 U.S.C. §1343(3), is not limited to "equal rights laws." Because "laws" creating "rights" to welfare and to social security payments were enacted pursuant to Congress' Article I, authority rather than pursuant to §5 of the Fourteenth Amendment, it might be argued, "symmetry" requires inclusion of Art. I, §10 rights in the term "Constitution" in §1983. See *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 667 at n. 43 (White, J. concurring).

Several reasons in addition to the tenor of the legislative history argue against that extension. First, those who enacted and revised §1983 doubtless recognized that the content of the term "laws" would and should expand as time passed.

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[12] In this regard, it is also important to recall that the 42d Congress was well aware that the Contract Clause was vigorously enforced in the period before the Civil War. See, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). See also *Developments, supra* at 1140; IC. Warren, *The Supreme Court in United States History*, ch. 11 (1922).

Although our Constitution may be "organic" rather than "static," existing provisions are plainly not subject to extension in the same sense that Congress may change "laws." Constitutional provisions and statutes, in other words, are not symmetrical for this purpose.

Second, the notion of "rights" secured by "laws" within the meaning of §1983 has not yet been extended beyond the protection of values related to the broad purpose of the Fourteenth Amendment. In one sense, of course, laws intended to provide at least a minimal level of subsistence are arguably presupposed by and derived from other constitutional rights. See *Chapman, supra* at 620. While prudence should caution against constitutionalizing a "right to minimum subsistence," the concept, as reflected in the term "laws," fits with the purpose of the Fourteenth Amendment. Indeed, when a statute-based liberty or property interest (entitlement) is created, a §1983 cause of action usually may be predicated upon due process or equal protection challenges to the state regulations or administrative practices in question. See, *e.g., Goldberg,* v. *Kelly,* 397 U.S. 254 (1970) (public assistance); *U.S. Dept. of Agri.* v. *Murry,* 413 U.S. 308 (1973) (foodstamps); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (parole); *Wolff* v. *McDonnell,* 418 U.S. 539 (1974) (good-time credit. So long as "rights" secured by federal "laws" do not extend beyond protection of those legislatively-created core interests which serve the contemporary functions the framers understood to be served by "liberty" or "property," see Reich, *The New Property,* 73 Yale L.J. 733 (1964), no serious violence is done to the intention of the framers of the Fourteenth Amendment or to the language of §1983. Extention of §1983 to the Contract Clause or to "rights" to "most favored lender" treatment, see *First National Bank of Omaha* v. *The Marquette National Bank of Minneapolis,* 636 F.2d 195 (8th Cir. 1980), or to a "right" to commence a tender offer within five days under the Williams Act, see *Kennecott Corp.* v. *Smith,* 637 F.2d 181 (3d Cir. 1980), would offend completely our sense of history and our common sense. Neither the language nor the history of

§1983, neither the purpose of the statute nor the decisions of this Court, require such a result.

III. Section 1983 Does Not Afford A Remedy To Corporations For Deprivations Of "Privileges Or Immunities" Secured Only To Citizens Of The United States.

Section 1983 provides a remedy to "any citizens of the United States or other person within the jurisdiction thereof . . . ." Corporations have been deemed "persons" and may assert any rights available to all persons lawfully within the United States. It is well-settled, however, that corporations are not "citizens." *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168, 177 (1869); *Hague* v. *CIO,* 307 U.S. 496, 514 (1939). Corporations, therefore, cannot invoke §1983 to remedy violations of privileges or immunities secured by Art. IV, §2 to citizens of each state, or by §1 of the Fourteenth Amendment to citizens of the United States. Thus, to the extent CF invokes a claim under the Privileges or Immunities Clauses, it is not eligible for attorney's fees under §1988.

Iowa contends, of course, that no "person" has any "rights, privileges or immunities" arising out of the Dormant Commerce Clause. Because CF has declined to elaborate upon its theory for inclusion of Dormant Commerce Clause cases within §1983 either to the Eighth Circuit or to this Court, Iowa is at something of a loss to respond to its claimed eligibility for fees. This argument is included here only because in the court below CF did cite to *Corfield* v. *Coryell,* 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823), for the proposition that the Privileges and Immunities Clause of Art. IV, §2 conferred "The right of a citizen of the state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; . . . ."

The *Corfield* theory is available only to citizens and thus not to CF, but Iowa would briefly note other difficulties with the

theory. First, §1983 was intended to enforce §1 of the Fourteenth Amendment and thus is limited to the privileges and immunities of *national* citizenship. *Slaughterhouse Cases,* 83 U.S. (16 Wall.) 36 (1873).

Second, even if Art. IV, §2 claims could be invoked under §1983, that Clause only requires a state to extend to noncitizens benefits conferred upon citizens, absent a substantial reason for differential treatment. See *Toomer* v. *Witsell,* 334 U.S. 385, 396 (1948); L. Tribe, *American Constitutional Law,* §6-33 (1978). The District Court explicitly found that the Iowa length limitation did not discriminate against out-of-state interests. *Consolidated Freightways* v. *Kassel,* 475 F.Supp. 544, 553 (S.D. Iowa 1979). CF was not, therefore, denied any privilege or immunity afforded Iowa citizens.

Third, the Iowa length limitation in no meaningful sense infringed upon any "right to pass through" Iowa. The length limitation did not operate at Iowa's borders; intrastate doubles carriers were required to abide by the length limit as well. Moreover, if a length limit is considered to infringe a right to pass through Iowa, then so must Iowa's regulation of vehicle speed, height, width and weight, and every safety regulation which imposes a cost upon carriers. This Court did not strike down Iowa's length limitation on the ground that it *excluded* traffic. *Consolidated Freightways* v. *Kassel,* ____ U.S. ____, filed March 24, 1981; 49 U.S.L.W. 4328. CF's claim was rather that length limitations imposed inefficiencies on its operation which were insufficiently justified by safety concerns. Neither *Corfield* v. *Coryell* in particular, nor the Privileges and Immunities Clause in general, supports CF's claim to attorney's fees.

IV. The Eleventh Amendment Bars An Award Of Attorney's Fees Against A State In Dormant Commerce Clause Cases Absent A Congressional Expression Of Intent To Abrogate Immunity.

Iowa contends that, were this Court to conclude that the language of §1988 authorizes attorney's fees in Dormant Commerce Clause challenges to state statutes, the Eleventh Amendment would bar the award of attorney's fees in this class of case. In the absence of some manifestation of Congressional intent to override the State's immunity, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), or an express or implied waiver of immunity by a state, *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964), this Court has declined to approve financial payments from state treasuries that would significantly impact on a state's fiscal planning process. *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Here, there is no statement at all in the text or the legislative history of 42 U.S.C. §1988 suggesting that Congress wished to impose attorney's fees in Article I cases and no basis for finding waiver. Should this Court hold that CF is eligible for fees, CF will, extrapolating from the $40,000 they sought for appellate work, seek an award in the hundreds of thousands of dollars. Requests for substantial awards will not be unusual in Commerce Clause cases because of the complex questions of legislative fact frequently involved.

In *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court upheld the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, as applied to a prison conditions case brought pursuant to the Eighth Amendment and §1983. This Court found, outside the four corners of the statute, evidence of legislative intent to abrogate immunity sufficient for Eleventh Amendment purposes when Congress is legislating pursuant to §5 of the Fourteenth Amendment. *Id.* at 693-94. In the alternative, this Court relied upon Congress' characterization of attorney's fees as recoverable "costs" relating to the expenses of litigation and held them outside the limitations of the Eleventh Amendment. *Id.* at 695-96.

In *Maher* v. *Gagne*, 448 U.S. 122 (1980), this Court upheld §1988 as applied to a challenge to AFDC regulations based upon the Social Security Act and the Fourteenth Amendment. This

Court held that the plaintiff, who had prevailed on her statutory claim, could be awarded fees because the constitutional claims were themselves sufficiently substantial to support federal jurisdiction. *Id.* at 130. Expressly reserved was the question "whether a federal court could award attorney's fees against a state based on a statutory, non-civil rights claim." *Id.*

Although Dormant Commerce Clause cases are "constitutional" rather than statutory, they are significantly farther removed from the purposes of the Fourteenth Amendment than is welfare litigation. For purposes of argument, we may assume that Congress could have abrogated immunity in this case pursuant to its Art. I, §8 powers. Plainly, it has not done so. There simply is an insufficient nexus between the clauses for Congress to abrogate immunity in Commerce Clause cases pursuant to §5 of the Fourteenth Amendment. Thus, the *Fitzpatrick* v. *Bitzer* basis of the holding in *Hutto* is not available here.

Attorney's fees may be awarded here only if, as "costs," they are beyond the purview of the Eleventh Amendment. Iowa cannot determine from *Hutto* and its progeny whether a majority of this Court subscribes to the "attorney's fees as costs" rationale and would, in any case, urge its reconsideration.

Although attorney's fees clearly bear some connection with other expenses of litigation, this case illustrates that attorney's fees often dwarf the other expenses and, indeed, the cost of implementing any prospective relief ordered. They may be a substantial, unanticipated drain on a state's budget. Substantial attorney's fees also serve, in effect, to punish a state for enacting a statute or, at least, for defending it in good faith. Indeed, that may be a legitimate purpose of §1988 in the true civil liberties, civil rights context. But Congress has an important role to play in defining our Federalism. While Congress has expressed its intention to place its finger on the scales on the side of individual rights, it has not expressed a similar intention to weigh in on the side of interstate business as the "delicate adjustment" of local and national interests in our Federalism is made by this

Court. Before the values of federalism fostered by the Eleventh Amendment are cast aside in Commerce Clause cases, this Court should require at least some expression from Congress that it wishes that done.

Finally, Iowa would note the familiar rule that statutes should be construed to avoid significant constitutional questions. At first blush it may appear difficult to apply that rule here because §1988, the statute whose constitutionality as applied would be in question, borrows from §1983 and it is the scope of §1983 which determines whether the constitutionality of §1988 will arise. However, as we demonstrate above, because the only operational consequence of bringing Commerce Clause case within §1983 would be to make prevailing plaintiffs eligible for fees under §1988, the rule should be fully applicable here. In any event, the questions addressed in earlier divisions of this brief are logically prior to the Eleventh Amendment issue and the latter need not be reached, if, as Iowa contends, Commerce Clause challenges fall outside §1983.

V. A Ruling On The Purely Legal Question To Eligibility For Attorney's Fees Need Not Be Accompained By A Statement of Reasons

CF complains that the Eighth Circuit was obligated to express formally its reasons for denying attorney fees and that this is the only issue which this Court may now consider. Iowa submits that the basis of the Eighth Circuit's decision may be easily inferred, but that the decision should be affirmed if Iowa was correct in urging below that §1983 should not be extended to Dormant Commerce Clause cases, irrespective of whether that was the unstated reason for the ruling.

CF suggests that in the absence of an explicit statement of reasons, this Court cannot discern the basis for denying fees below. In the Brief for Petitioner at pp. 6-7, CF conjures up ten (10) possible grounds for the denial of attorney's fees. Several of the "possible" grounds are either plainly inconsistent with 42 U.S.C. §1988 or have been expressly rejected by this Court. The

only remaining ground that would justify a *total denial* of attorney's fees, as opposed to a remand to the district court, is the ground that CF is entitled to no fees because Dormant Commerce Clause cases do not fall within §1983. The ground, and the only ground, urged by Iowa in this Court and in the court below is that CF was not eligible for any fees because this case is not within §1983 and, therefore, not within §1988. CF cannot be genuinely puzzled about the basis upon which fees were denied below.

Even if one could not discern the actual reason for the total denial of fees by the Eighth Circuit, effective appellate review does not require a statement of reasons here. To the extent Iowa presented below as a reason for denial of fees a purely legal theory upon which this Court is the final authority, this court may review the correctness of the ruling below.

As a general matter, issues concerning fee-shifting fall into three principal categories: 1) whether there is statutory authority to depart from the "American Rule," (eligibility); 2) whether "special circumstances" warrant the denial of fees to a prevailing party (entitlement); and 3) the amount of fees to be awarded to an eligible and entitled party. The questions of "entitlement" and amount are by statute and by decision committed to some degree to the sound *discretion* of the trial court

and the appellate courts review only for abuses of that discretion. Admittedly, it will be difficult to review a discretionary judgment if the underlying rationale is not explained. Iowa does not dispute the proposition that, at least as a prudential matter, a trial court should ordinarily state for the record the basis for exercising its *discretion.*[13] All of the authority cited by CF relates to the categories of "entitlement" and amount, not to the category of "eligibility."[14]

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[13] In *Sumner* v. *Mata,* ____ U.S. ____, filed Jan. 21, 1981; 49 U.S.L.W. 4133, this Court required federal district courts in habeas corpus proceedings to state for the record the grounds for rejecting the "presumption of correctness" of state court factual determinations set forth in 28 U.S.C. §2254(d). This requirement was imposed in a context where the lower courts were examining questions of fact or applying the "standards" of §2254(3) to a state court record (a "mixed" question of law and fact). This Court did not require a statement of reasons in the context of statutory construction, which is the context in which this case appears. A reasoned elaboration is always desirable, but practical considerations sometimes dictate *summary* disposition of legal questions. See Rules 16.7 and 23.1, Rules of the Supreme Court of the United States, (1980); Rules 9 and 14, Local Rules, Eighth Circuit Court of Appeals (1978).

[14] On pages 12 and 13 of Brief for Petitioner, CF cites six courts of appeal decisions for the proposition that statements of reasons for granting or denying fees must be provided. In all of the cases cited, the issue was what Iowa has labelled either "entitlement" or "amount." As the parentheticals that follow make clear, none involved the question of eligibility under §1988. *Sargeant* v. *Sharp,* 579 F.2d 645, 647 (1st, Cir. 1978) ("entitlement," "special circumstances"); *McGowan* v. *King, Inc.* 616 F.2d 745, 747 (5th Cir. 1980) (amount); *International Society for Krishna Consciousness, Inc.* v. *Anderson,* 569 F.2d 1027, 1029 (8th Cir. 1978) (issue of "entitlement," but no requirement that district court state reasons); *Fountila* v. *Carter,* 571 F.2d 487, 496-97 (9th Cir. 1978) (amount); *O'Neil* v. *City of Lake Oswego,* 642 F.2d 367, 371 (9th Cir. 1981) (amount); *Kimbrough* v. *Arkansas Activities Ass'n.,* 574 F.2d 423, 427 (8th Cir. 1978) ("entitlement," "special circumstances"). In *Kimbrough,* the Eighth Circuit properly decided the "eligibility" question itself and remanded only on the "entitlement" issue.

The question of "eligibility" which Iowa urged below and urges in this Court should be resolved against CF, is a pure question of law upon which this Court owes no deference to the unique position or expertise of a finder of fact. A lower court ruling on a pure question of law is not upheld only to the extent that the court states the correct reasons for its ruling. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *Helvering* v. *Gowran*, 302 U.S. 238, 245-46 (1937). A lower court is upheld if it can be determined by the appellate court that the result below should be the same as it was previously. It is the *decision, ruling* or *order* which must be correct. Whether the reasoning must be correct is important if but only if a reviewing court cannot determine the former without determining the latter.

For example, if Party A objects to the admissibility of Party B's documentary exhibit as privileged *and* as hearsay and the trial court simply rules — "sustained," an appellate court will affirm a judgment for Party A if *either* objection was well-founded. It is not decisive for appellate purposes that the trial court did not state a reason for the ruling. Indeed, it would not be grounds for reversal if the trial court had excluded the evidence because he incorrectly concluded it was privileged if the appellate court concludes the evidence was inadmissible hearsay.

For similar reasons, CF's suggestion that the "Question Presented" in their Petition for Certiorari precludes consideration of their eligibility for fees is plaintly groundless. While the "Questions Presented" limits the scope of petitioner's attack on the ruling below, it is obviously settled that a respondent may defend the ruling below on any ground fairly presented by the record.

In *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 at n. 8 (1977), this Court considered an issue urged by respondent company not encompassed within the Government's petition for certiorari "because the prevailing party may defend

a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." Similarly, in *Ryerson* v. *United States,* 312 U.S. 405, 408 (1940), although the court below had erroneously concluded that trusts were "persons" when gifts were made within the meaning of §504(6) of the Internal Revenue Code, the Government was permitted to justify the judgment in its favor on the ground that the gifts in question were within the exclusion for future interests. See also *Dandridge* v. *Williams,* 397 U.S. 471, 475 at n. 6 (1970); *Marshall* v. *Pletz,* 317 U.S. 383, 390 (1943); *Texarkana* v. *Arkansas Louisiana Gas Co.,* 306 U.S. 188, 198 (1939); *Langnes* v. *Green,* 282 U.S. 531, 539 (1931).

Finally, CF stresses that district courts are better suited than courts of appeal for making the initial determinations of entitlement to and the amounts of fees and urges this Court simply to remand the entire fee question to the district court.

Of course, in two important senses, the "preferable court" issue is not the primary issue before this Court. First, *CF asked the court of appeals,* not the district court, to award it fees and that request was for a specified dollar and cents amount. CF did not move to remand until its initial application for fees was denied. Had the Eighth Circuit awarded CF fees in the amount requested, CF would not be here questioning the court's authority to do so.

Second, if this Court were to determine that CF is eligible for fees, the ordinary procedure would be to remand to the Court of Appeals for further proceedings, including determination of the appropriate forum for resolution of any remaining issues. However, for the reasons set forth above, the Eighty Circuit correctly ruled that CF was ineligible for §1988 attorney's fees. To affirm, this Court need only concur in that ruling on a question of law. No remand to either court for a statement of reasons is required.

CONCLUSION

The ruling of the Court of Appeals denying attorney's fees should be affirmed.

Respectfuly submitted,

THOMAS J. MILLER
Attorney General of Iowa

MARK E. SCHANTZ
Solicitor General
Department of Justice
2nd Floor, Hoover Building
Des Moines, Iowa 50319
(515) 281-5191

ROBERT W. GOODWIN
Special Assistant Attorney General
Department of Transportation
Ames, Iowa 50010
(515) 296-1521

LESTER A. PAFF
Assistant Attorney General
Department of Transportation
Ames, Iowa 50010
(515) 296-1636

Attorneys for Appellants